
U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza Bldg, 5th Floor
111 Veteran's Memorial Boulevard
Metairie, LA 70005

Date Issued: December 3, 1997

Case No. 96-ERA-36

In The Matter of

MICHAEL L. ROSS
Complainant

v.

FLORIDA POWER & LIGHT
COMPANY
Respondent

APPEARANCES:

FRANK J. MCKEOWN, JR., ESQ.
For the Complainant

JAMES S. BRAMNICK, ESQ.
CARMEN S. JOHNSON, ESQ.
For the Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protective provisions of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5951 (1988 and Supp. IV, 1992)

and the regulations promulgated thereunder at 29 C.F.R. Part 24. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission (NRC) who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

I. Procedural Background

This matter was initiated by a complaint filed with the U. S. Department of Labor (DOL) on June 21, 1996, by Michael L. Ross (Complainant/Ross) against Florida Power & Light Company (FPL/Respondent). (CX-1). Therein, Ross alleges that Respondent harassed and terminated him in retaliation for allegedly refusing to falsify calibration data sheets during the verification/testing process and for allegedly reporting such suggested falsification to the NRC in the spring of 1994 and in March, 1995.

More specifically, Complainant alleges that he was harassed by co-workers and supervisors by being called "stupid" and made the subject of a cartoon which referred to him in an "anti-Semitic manner." Furthermore, he was assigned the menial task of "guarding the doorbell" and "systematically" denied training in retaliation for having engaged in protected activities. (ALJX-10, page 5). Complainant contends that he was denied unescorted access, verbally threatened by co-workers for having filed "grievances," subjected to a locker and desk break-in and discriminatorily terminated from employment. (ALJX-10, pp. 6-7).

On July 19, 1996, DOL advised Complainant that his complaint could not be further investigated administratively because it was untimely filed. It was determined that Complainant received unequivocal notice of his termination on November 3, 1995, effective 45 days thereafter, and had failed to timely file his complaint within 180 days from the alleged date of discrimination. (ALJX-10, Exhibit B; CX-2).

Subsequent to Complainant's timely filing of a request for hearing, Respondent filed a Motion for Summary Decision based on Complainant's alleged failure to timely file his complaint of discrimination. (ALJX-2). Complainant was permitted to respond thereto. (ALJX-3). On November 6, 1996, the undersigned issued an Order Denying Respondent's Motion for Summary Decision because of the existence of genuine issues of material fact and the paucity of record evidence. (ALJX-9).

A formal hearing was conducted in this matter on April 28-30, 1997 in Miami, Florida. Post-hearing briefs and proposed Findings of Fact and Conclusions of Law were received from the parties on August 15, 1997, supplemented by addenda on or about August 28, 1997.

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On July 25, 1997, Respondent filed a Motion to Reopen the Record to admit a report of investigation by the NRC dated March 20, 1997, involving Respondent's alleged illegal discrimination against Complainant in violation of the ERA. Subsequent to an Order To Show Cause and supplemental briefing, the report of investigation was received on August 14, 1997, as new and material evidence not readily available before the close of the hearing. (See RX-48).

All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit written arguments. The following exhibits were received into evidence:[1]

Complainant's Exhibits Nos. 1-3, 6-14, 16, 20, 21(b), 21(c), 34, 44, 61, 62,
Respondent's Exhibits Nos. 1-32, 34-48
Administrative Law Judge Exhibits Nos. 1-12

Based upon the evidence adduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

II. ISSUES

1. The timeliness of Complainant's Complaint.
2. Respondent's Alleged Discriminatory Actions

III. SUMMARY OF THE EVIDENCE

A. Background

Complainant began employment with Florida Power & Light Company on March 13, 1989 at its Port Everglades Plant. (Tr. 51-52). At the time of the hearing, Ross was 34 years of age and had obtained a Bachelor of Science of Applied Physics degree from Georgia Tech University in 1988. (Tr. 52). He served two years on active duty with the United States Army Chemical Corps at Ft. Stewart, Georgia. During his tenure with the chemical corps, he was assigned to a nuclear, biological and chemical company. (Tr. 53).

Complainant testified that he began with Respondent as an Associate Plant Technician or Associate Lab Technician. (Tr. 56). The Port Everglades Plant was a fossil plant and not a nuclear plant. (Tr. 57). In approximately June, 1990, Ross bid on and received a transfer to the Turkey Point Nuclear Plant to fill an Associate Nuclear Plant Operator position (ANPO). (Tr. 58-59). He worked as an ANPO from 1990 to 1992, at which time he transferred into the Instrument and Control Department (I&C). (Tr. 65). At that time he went through a training

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program of approximately 16 weeks to become an I&C Technician. (Tr. 68). Ross worked in the I&C Department from 1992 to the end of 1995. (Tr. 69).

B. The Calibration Lab Assignment

According to Ross, he transferred into the Calibration Lab (Cal Lab) at the request of John Halvorsen, the Lab Supervisor. (Tr. 73). The Cal Lab calibrates and distributes equipment which is then, in turn, used to calibrate the equipment that runs the plant. (Tr. 71). He stated that he worked periodically during the summer of 1993 filling in for Cal Lab employees. According to Ross, a vacancy occurred and he was asked to fill that vacancy but continued in his designation as I&C Specialist. (Tr. 73-74). Halvorsen testified that Ross was temporarily assigned to the Cal Lab because of his light duty status. (Tr. 675). Steve Franzone, I&C Department Supervisor, testified that Ross was temporarily assigned to the Cal Lab because of his light duty status to issue test equipment. (Tr. 595, 597).

Ross alleges he was not given any training in the Cal Lab although he requested training on various occasions. (Tr. 74). Complainant testified that Larry Sloan, an employee of the lab, showed him a few things but otherwise he received no training. Complainant's responsibilities included issuing equipment and doing some calibration under supervision. (Tr. 75).

On cross-examination, Ross testified that on September 8, 1993, he was involved in an automobile accident and suffered back and neck injuries for which he was required to wear a neck brace. He was placed on light duty by Dr. Ernest Baustein. (Tr. 212; RX-1). Although Complainant stated that he was transferred into the Cal Lab in the fall of 1993 after bringing in a light duty note to Franzone, he was not certain whether he was transferred to the Cal Lab because of his light duty status. (Tr. 214-215). He was never informed that his post-accident limitations were a motivating factor for his transfer to the Cal Lab. (Tr. 79).

Ross testified that a calibration is the application of certain inputs to a piece of equipment to verify that the appropriate outputs are being derived. (Tr. 81). Prior to his transfer to the Cal Lab, he had occasion to perform field calibrations during the course of his employment in the I&C Shop by completing a work package. (Tr. 82). He was required to go through a series of applied pressures based on calibration using a Cal Lab gauge as a reference. (Tr. 83).

Ross could have become qualified to perform calibrations through training and by meeting a job performance measure, however, he was never qualified. He requested from Halvorsen the opportunity to become qualified, however, Halvorsen informed him that he was "incapable of learning." (Tr. 84). Halvorsen testified that Ross was not strongly considered for training because he was only temporarily assigned to the Cal Lab. Halvorsen denied

telling Ross that he was incapable of learning. (Tr. 678, 707). Ross admitted that he had no knowledge whether Halvorsen's discussion with him concerning this incapacity to learn or be trained had any relationship to his contact with the NRC. (Tr. 235).

In the spring of 1994, Ross questioned a reporting method in pressure gauge readings while employed in the Cal Lab. He reported his concern to Halvorsen and the other Lab employees: Harold "Hal" Blehm, Larry Slone and Claude "Sonny" Arashiro. (Tr. 86). He believed that procedures, as he understood them, should be followed and readings for each pressure test should be recorded. (Tr. 87). He was instructed "just to copy-over the first four to the last four and just do five." (Tr. 87). Halvorsen, Blehm, Slone and Arashiro specifically denied instructing Ross to "copy over" readings, to enter false readings on the data sheets or being advised by Ross that he had a concern about completing calibration data sheets. (Tr. 702-703, 724, 743, 753-754).

On cross-examination, Ross testified that Blehm told him to perform the first five ascending readings and then "copy over" the descending readings when calibrating a gauge. Moreover, Ross was instructed to record the readings on the calibration data sheet, which he considered to be a falsification of the readings. Ross acknowledged that it was only on this "one single occasion" that he was so instructed by Blehm. (Tr. 220). Blehm specifically denied such instruction and stated that such a procedure would violate his personal, as well as company policy. (Tr. 753, 758). Ross testified that Slone also informed him to "copy over" the descending readings because Blehm wanted the calibration performed in that manner. (Tr. 221). Ross stated that at the time of the Slone conversation, Halvorsen was standing two feet away from them and Blehm was sitting at a bench with Arashiro. (Tr. 221-222). In response to Slone's instruction, Ross stated that he informed Slone he would perform all of the readings and fill out the data sheet. He then looked at Halvorsen but did not say anything. Halvorsen was "kind of silent." (Tr. 222). As noted above, Halvorsen, Slone, Blehm and Arashiro denied the foregoing.

Ross testified that during his tenure in the Cal Lab he was assigned to move certain objects around during a reorganization. He informed Halvorsen that he was on light duty and refused to perform certain tasks. (Tr. 225). Ross testified that disagreements occurred between him and Blehm which prompted discussion between Ross and Halvorsen. He recalled Halvorsen explaining to him that any bickering between Ross and the other Cal Lab employees must stop and that if Ross could not do his best then he should return to the I&C Shop. Ross acknowledged that he then handed Halvorsen his Cal Lab door key. Halvorsen responded that Ross did not pick and choose where he was going to work; his job was to work in the Cal Lab. (Tr. 227-228, 687; See RX-2). Halvorsen then instructed him to report to the front of the lab, sit at the window and issue equipment to employees. (Tr. 228). This presumably constitutes a "request to transfer" from the Cal Lab under Complainant's theory of a continuing violation.

Halvorsen, Blehm, Slone and Arashiro denied awareness of Ross allegedly raising nuclear safety concerns in the Cal Lab. (Tr. 682, 689, 725, 743-744, 753-754).

Franzone testified that Ross complained to him after transferring back into the I&C shop about not being qualified or trained in the Cal Lab. Franzone concluded that it did not make sense to train Ross to qualify in the Cal Lab because he was only on temporary assignment. (Tr. 602). According to Franzone, Ross did not associate a lack of training or qualification in the Cal Lab to raising his alleged nuclear safety concerns or the falsification of calibration data sheets. (Tr. 598).

C. The Alleged Complaints to the NRC

According to Ross, in the spring of 1995 he made a complaint to Tom Johnson, Senior Resident Inspector for the NRC stationed at the Turkey Point Nuclear Plant facility. He asked Johnson to go down to the lab and observe how calibrations were being performed. He also brought to Johnson's attention the same complaint sometime in 1994, however his complaint in 1995 was more detailed. (Tr. 88). The 1994 and 1995 complaints were both made by telephone. (Tr. 89). Complainant also raised issues to Johnson in 1995 of harassment by being called "stupid." Complainant stated that, as a result of his contact with Johnson, an investigation was conducted and changes were made with reference to the pressure gauges. Complainant did not testify that he identified himself by name to Johnson as a concerned employee. (Tr. 90).

Ross testified that after his contact with Johnson in 1994, Halvorsen sat him down and informed him that fellow lab employees Arashiro and Blehm thought he was incapable of learning, could not be trained and, therefore, he would only be asked to work in the front room issuing equipment and performing retention and record keeping duties. (Tr. 91). According to Ross, he continuously sought certification training in the Cal Lab, but was never given an opportunity. (Tr. 91-92).

Ross acknowledged that he did not inform anyone at FPL that he had spoken to Johnson and that he "definitely" tried to keep his contact confidential. Ross testified that because of the abrupt change in his treatment by the Cal Lab employees and supervisor, he speculated that they had knowledge of his contact with Johnson of the NRC as evidenced by Halvorsen assigning him to the front of the lab to "guard the doorbell" and issue equipment. However, Halvorsen's assignment also coincided with the confrontation regarding the return of the Cal Lab key and his refusal to perform certain taskings. (Tr. 230-231). Ross acknowledged that other than his speculation concerning the abrupt change in attitude in the Cal Lab, he had no evidence that Respondent had any knowledge of his telephone conversation in the spring of l994 with Johnson of the NRC. (Tr. 232). Halvorsen, Blehm, Slone and Arashiro denied any knowledge that Ross contacted Johnson or the NRC about any complaints. (Tr. 682, 689, 703, 707, 725, 743-744, 753-754).

Ross testified that he was transferred back into the I&C Shop in the spring or

early summer of 1994. Thus, he had returned to the I&C Shop at least eight or nine months before registering a second complaint to Johnson in approximately March or April 1995 concerning calibration readings. (Tr. 96). It was during this telephone conversation that Ross raised the Cal Lab data sheet falsification and "copy over" instructions from Blehm and Slone. Notwithstanding the suspect timing of these alleged complaints, Ross incredulously testified that after lodging the 1995 complaint to Johnson he noticed a "change" in his relationship with Halvorsen and his co-employees in the Cal Lab, a continual denial of training and persistently being called "stupid." (Tr. 96). Ross no longer worked in the Cal Lab after early summer 1994.

Johnson allegedly informed Ross that he never checked on calibration readings and it would probably be a good time to do an inspection in the Cal Lab. (Tr. 237). Ross stated that he believed Johnson issued a report of the inspection on May 22, 1995. (Tr. 238). However, no such inspection report was proffered into evidence. Ross contended, without specificity or factual rationale, that the Cal Lab and the I&C Shop connected Johnson's alleged inspection in 1995 to his complaints regarding calibration readings and torque wrenches made in 1994 and 1995. (Tr. 238-239).

Halvorsen testified that in September 1996 the NRC evaluated the calibration process in the Cal Lab and, as a result of the inspection, Blehm revised the written procedure to specifically include a check of "hysteresis," outputs derived from descending readings reflecting tolerance or variance in readings. (Tr. 704-705; RX-9).

On cross-examination, Ross reiterated that all of his contacts with Johnson of the NRC were made by telephone and that he attempted to keep all contacts confidential and did not discuss his contacts with anyone at Florida Power & Light. (Tr. 412-413). He acknowledged that, other than attitude changes of his co-workers, he had no evidence or knowledge that anyone at Florida Power & Light was aware he had conversations with the NRC. (Tr. 413-414).

On July 9, 1996, the NRC initiated an investigation of Complainant's allegations of discrimination for having contacted Senior Resident Inspector Tom Johnson. (RX-48). The investigative report, dated March 20, 1997, was received into evidence as factual findings reached by a government agency as a result of an investigation conducted under the auspices of the NRC which constituted an exception to the hearsay rule. See 29 C. F. R. §§ 18.803(a)(8) and 18.902(a)(11)(1997). [2]

Johnson reported that, although Ross had spoken to him on several occasions in early 1995, Ross never alleged any falsification issues or safety concerns and specifically never mentioned any issue related to the falsification of calibration records of pressure instruments. Instead, Ross had questions and comments about "training and qualification related to the measuring and test equipment process and about fitness for duty policies and work environment." (RX-48, p. 6). Johnson further reported that Ross did not make any allegations

about the falsification of calibration records to the NRC until March 4, 1996, well after his discharge. Such allegations were inspected and determined to be unfounded. (RX-48, p. 7). It was concluded that prior to his discharge, Ross never raised any issues to Johnson which were cognizable under NRC jurisdiction. (RX-48, p. 9). Thus, the NRC concluded that the investigation did not substantiate the allegation that FPL had illegally discriminated against Ross. (RX-48, p. 11).

D. Training

Upon returning to the I&C Shop, Ross requested further training, specifically a vendor training class, scheduled for June 1995, for a piece of equipment manufactured by Hagen. He was not chosen to attend the class for various reasons which were expressed to him by different supervisors. Ross recalled that Dennis Garner, his supervisor, informed him that another employee was being sent to the training because he had better attendance than Ross. (Tr. 97). At other times, he was informed that time in the shop, seniority and shift alignments were determinative factors in who was being selected to attend the class. (Tr. 98, 278). Ross acknowledged that of the approximately 50 I&C shop employees, only about 10 were selected to attend the Hagen training. (Tr. 277).

Ross admitted that absenteeism was a problem for him and that Garner had counseled with him on several occasions concerning his absenteeism. (Tr. 252, 783-784; See also attendance records, RX-47).

As a result of his exclusion from Hagen vendor training, Ross attempted to file a grievance seeking ,000.00 per day in damages which was not accepted by the union since damages were not an appropriate remedy through the grievance procedure. Ross did not re-file the grievance thereafter. (Tr. 279).

Hugh Thompson, shop steward, corroborated Complainant's recollection of the grievance. (Tr. 795-797). Thompson further testified that Ross never mentioned any alleged nuclear safety concerns, problems with completion or falsification of data sheets or having contacted the NRC at any grievance meetings. Ross never told Hugh Thompson that he felt he was being retaliated against, being called "stupid" or denied training because he raised nuclear safety concerns or contacted the NRC. (Tr. 798, 813).

Dennis Garner testified that only eight spaces were available for day shift employees to attend Hagen vendor training. Three of the eight spaces were filled by employees who actually repaired Hagen equipment and additional spaces were available for employees who worked with Hagen modules in the control room. Garner did not select Ross for Hagen training because he was a day shift employee who did not repair or work with Hagen equipment in the control room. (Tr. 768-769). Garner testified that he had no knowledge that Ross had allegedly raised nuclear safety concerns, complained about

falsification of data sheets or had contacted the NRC. (Tr. 766, 769-770, 780). Ross never indicated to Garner that he felt retaliated against by non-selection to the

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Hagen training class because he allegedly raised nuclear safety concerns. (Tr. 772). Garner testified that the majority of I&C shop employees were not selected to attend Hagen training. (Tr. 771).

In early 1995, Ross spoke with Lloyd Thompson, a field supervisor, about obtaining training. (Tr. 116). No change in training opportunities occurred as a result of his discussion with Thompson. Complainant testified that he also spoke to Tom Plunkett, who at the time was the FPL site vice-president, concerning lack of training. (Tr. 117). As a result of that contact, Bob Marshall of Human Resources recommended that he consult with Dr. Luis Rodriguez. On March 2, 1995 he met with Dr. Rodriguez. (Tr. 117, 121). Ross initially testified that he returned to see Dr. Rodriguez and spoke to him about training and harassment. When specifically asked whether he recalled seeing Dr. Rodriguez in March of 1995, he stated that, "I may have, I don't specifically recall that." (Tr. 121). Ross made no attempt at that time to seek external counseling as suggested by Dr. Rodriguez. (Tr. 122).

Ross, through the bid process, sought other jobs including an ANPO and RCO (Reactor Control Operator) positions. (Tr. 98). He was selected to transfer into an ANPO job on September 14, 1995, and instructed to report on October 31, 1995. (Tr. 98-99).

Ross testified that he filed several grievances, one of which involved whether his previous experience as an ANPO at Turkey Point for two years would be counted towards his need for training as an ANPO. As a result of the grievance it was determined that none of his previous experience would be counted. (Tr. 121). Several meetings were held in the first week of September and again on September 13, 1995, to discuss Ross' grievances regarding his lack of training opportunities. Ross did not testify as to the results of the pending grievances over training. (Tr. 125).

Franzone testified that in August 1995 Hugh Thompson approached him about Complainant's desire for training, including Hagen training. Franzone held several meetings with Ross and his union representatives about training, however, safety concerns were never mentioned. (Tr. 611). Franzone explained that the Hagen training occurred in June 1995 but that such training would be offered in the future and Ross may be considered eligible for such training. (Tr. 610). Franzone further explained that Ross was not selected for Hagen training because the training concentrated on repairing modules and working on a component level basis, and Ross had poor attendance and lacked extensive experience in working in the Control Room. (Tr. 614-615). Franzone stated that the union never submitted a grievance regarding a nuclear safety concern on behalf of Ross, and Franzone never had any knowledge before Complainant's discharge

that he had allegedly contacted the NRC despite attending numerous meetings with Ross. (Tr. 618).

E. Name-calling

Ross testified that he was initially referred to as "stupid" in 1991 during a discussion among co-employees in the operations department when he was employed as

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an ANPO at the Turkey Point Nuclear Plant. (Tr. 103-104). Thereafter, he was continually called by this nickname, "stupid." (Tr. 107). After his transfer to the I&C Shop, Supervisor Ron Miller referred to him as "stupid" and "would get other people" to do so. (Tr. 108-109). Ross acknowledged that Miller, who was an operations supervisor, engaged in name-calling two years before his alleged contact with the NRC. (Tr. 207).

Ross denied that upon his transfer to the I&C shop he introduced himself as "Michael, they call me stupid in operations." (Tr. 210). He stated that before being transferred to the Cal Lab in 1993 Supervisor Larry Fuhrmann engaged in name-calling by referring to him as "stupid." (Tr. 211). However, Bob Marshall, Dennis Garner and Steve Franzone never called him "stupid." (Tr. 211).

Although Ross stated that he complained to supervisors in 1992 about being called "stupid," when specifically asked to identify such supervisors, he was unable to do so. (Tr. 109-110). Ross testified that later in his employment in the I&C Shop and Cal Lab, around 1994, he was called "stupid" on a daily basis. However, he was unable to complain to his immediate supervisors, Howie Crouch and Larry Fuhrmann, because they too participated in such name-calling. (Tr. 110-111).

Complainant testified that upon reporting to the Cal Lab he did not recall introducing himself as "Michael Ross, everyone in operations called me stupid." (Tr. 216). He testified that neither the employees of the Cal Lab nor Halvorsen referred to him as "stupid." (Tr. 217). Halvorsen and co-Lab employees Blehm, Slone and Arashiro corroborate Ross in this regard. (Tr. 707, 726, 739, 745, 754).

Complainant testified that in the summer of 1994 (July) he went to Tom Wogan, a plant supervisor, and complained about being called stupid and about being "harassed." Wogan suggested that he speak with Franzone. (Tr. 111-112). Ross later complained to Franzone but the name-calling did not stop. He reiterated his complaints to Franzone about being called stupid and raised a "bigger concern" about being denied training and referred to as "incapable of learning." (Tr. 113).

On cross-examination, Ross testified that he did not inform Wogan that he thought about killing people, however, he may have said something about being harassed and called stupid, and not receiving training to which he commented, "what do I have to do to

get them to stop? Do I need to kill them or do I need to O.J. them?" (Tr. 251). He acknowledged that he could have informed Wogan that "he was the calmest person out here and if it comes to a choice of ruining someone's day . . ." without completing his thought. (Tr. 252; RX-10).

Ross acknowledged that in the summer of 1994 he had a confrontation with employee Norm Jacques in FPL's parking lot in the presence of fellow car pool rider Joe Myszkiewicz. Ross testified that Jacques cut him off in the parking lot, looked at him and laughed,

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after which Ross parked his vehicle and approached Jacques. He admitted placing his hand near or on Jacques' neck area and putting a "choke hold" on Jacques. (Tr. 254-255). He told Jacques that he had better not cut him off in the parking lot again. (Tr. 255). Myszkiewicz testified that Ross lunged at Jacques, picking him up from underneath the neck and stated "don't ever do that to me again." (Tr. 894-895).

After the parking lot incident, management recommended to Ross that he speak with Dr. Luis Rodriguez, a psychologist in the Employee Assistance Program (EAP). (Tr. 114). Ross spoke with Dr. Rodriguez about training and being called "stupid." Ross was informed that EAP could do nothing about training or name-calling and suggested that he undergo testing. (Tr. 115). Ross began but did not complete all of the recommended testing. He spoke with Dr. Rodriguez about obtaining psychiatric counseling, however Dr. Rodriguez was not "willing to help me or talk to me" about training or the name-calling. (Tr. 115). Ross stated that he may have declined to meet with the EAP in October 1994 and that he declined to use external counseling as suggested by the EAP in March 1995. (Tr.256-257).

In about April 1995, Ross talked to the site vice-president, Plunkett and Marshall of Human Resources concerning the harassment by co-workers and not receiving training. (Tr. 259-260). Ross acknowledged that during the discussions with Marshall he did not raise any nuclear safety concerns or mention retaliation by anyone because of raising such concerns. (Tr. 266). Ross further stated that he considered the harassment of being called stupid to be a nuclear safety concern. (Tr. 266-267). On cross-examination, Ross equivocated in response to whether or not he informed Marshall or anyone else at FPL before his discharge that he was being retaliated against in any way because of raising nuclear safety concerns. (Tr. 267-272).

Ross testified that he went to Plunkett after viewing an old beach movie in which truck drivers wore T-shirts that read "I'm stupid" and "I'm with stupid." (Tr. 273-274). He reported the same labeling was placed on his hat as well as a co-employee's hat approximately four years before he saw the movie (approximately 1991). (Tr. 274). Mr. Plunkett informed him that he could not do anything about what people called him. (Tr. 276).

Ross never complained to Garner or Hugh Thompson about employees engaging in name-calling. (Tr. 790, 823). Myszkiewicz testified he never heard anyone call Ross "stupid," nor did Ross ever complain to him about being called stupid during the three years they car pooled together. (Tr. 897). Joel Smith, the shop cartoonist, stated he did not call Ross "stupid," nor did he ever hear anyone else engage in such name-calling. (Tr. 865). Michael Bridgeman, a fellow I&C specialist, testified that he never referred to Ross as stupid, nor did Ross ever complain to him about name-calling. (Tr. 832). Leo Capera, Ross' co-worker, admitted calling Ross "stupid" on one occasion, but after admonishment from Franzone, he ceased the name-calling. (Tr. 875-876). Capera testified that he had no knowledge of Ross raising any nuclear safety concerns or going to the NRC. (Tr. 881).

In August 1994, Franzone spoke with Ross after being informed by Human Resources of Wogan's July 1994 encounter with Ross and the Jacques incident. (Tr. 604-605). Ross told Franzone that "people in the shop" including supervisor Furhmann were calling him "stupid." (Tr. 606). Ross never stated to Franzone that he had any issues with falsification of calibration data sheets or nuclear safety concerns. Ross never mentioned any retaliation for raising nuclear safety concerns. (Tr. 607).

F. The "Parting of the I and Sea" Cartoon

On September 14, 1995, a cartoon was published and circulated in the shop which depicted Ross as one of five employees selected to leave the I&C shop and become ANPO operators in the Operations Department. (Tr. 125-126). Ross took offense to the cartoon because it depicted him chasing butterflies with a "stupid look and wearing a yarmulke." (Tr. 126). Ross interpreted the cartoon as a portrayal of him being a traitor. He faced a different direction the other four employees, was not going with them, and was between supervision and the people who were leaving the I&C shop. (Tr. 126).

Ross acknowledged that he and four other I&C specialists bid and were awarded jobs in the Operations Department as ANPOs. (Tr. 288). Ross testified that he was not aware Franzone delayed the five employees from going to the ANPO job because he needed I&C specialists. (Tr. 289). He further acknowledged that he did not understand the cartoon reflecting the five employees and Franzone as descriptive of Franzone's efforts to retain employees, even though the cartoon character "Joses" was stating "Let my people go!!" (Tr. 289; RX-40).

The cartoon reflects four people walking toward the parted sea, one person going to the left chasing butterflies and Franzone pushing a cart as the "pizza, pizza guy." (Tr. 290). Ross testified that he is depicted as facing away from the parted sea wearing what he perceives to be a Jewish yarmulke rather than "thinning hair." (Tr. 292). He acknowledged that the cartoonist, Joel Smith, could have intended the area on the top of his head to be a bald spot. (Tr. 293). He did not understand the intention of the cartoonist depicting him facing away from the other employees or why he was releasing butterflies.

(Tr. 293-294). More importantly, Ross could not explain how the cartoon had anything to do with any nuclear safety concerns or retaliation for raising such concerns. (Tr. 294-297, 300).

Myszkiewicz, one of the I&C specialist selected to transfer to an ANPO position, testified that the circle at the back of Complainant's head in the cartoon referred to his "distinctive bald spot" and found nothing offensive about the cartoon even though he knew Ross was Jewish. (Tr. 898-899).

Joel Smith, a digital I&C specialist who drew the cartoon, testified he never intended to harm or offend anyone. (Tr. 856). He did not know Complainant's religion and did not

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intend any religious overtones. Ross was depicted with a bald spot on the back of his head and not wearing a Jewish yarmulke. (Tr. 861). Smith was unaware that Complainant allegedly raised any nuclear safety concerns or felt retaliated against for having done so. (Tr. 862).

Bridgeman denied telling Ross that if he complained about the cartoon "we'll get rid of you." (Tr. 835-836). He believed the cartoon reflected Complainant's bald spot at the back of his head. (Tr. 832). Capera and Garner saw no religious overtones or anti-Jewish sentiments in the cartoon and thought the circle at the rear of Complainant's head represented his bald spot. (Tr. 775, 880). Hugh Thompson told Ross he thought the spot on his head in the cartoon represented his bald spot, not a yarmulke. (Tr. 860).

On September 15, 1995, the following day, Ross requested an assignment to work with Smith because he wanted to learn to draw cartoons and wanted Smith to show him how to do so. (Tr. 302). Supervisor Fuhrmann declined to assign Ross to work with Smith. Ross then sought out Garner for assignment to work with Smith. Garner also refused such a request. (Tr. 304). Ross informed Garner that perhaps during breaks Smith would do a cartoon for him or show him something. Ross indicated that he desired to speak with Smith to diffuse the situation with everyone being mad at him because of rumors that he had complained to management about the cartoon. (Tr. 139). Ross acknowledged that he may have said something to the effect that he was afraid to wait because he might "lose the balls" to do what he wanted, needed or intended to do. (Tr. 304). Ross stated that he had no evidence that Smith knew he was Jewish when he drafted the cartoon. (Tr. 309).

Ross became offended when other employees referred to him in the cartoon as "fucking stupid." (Tr. 127). Ross testified that he went to complain to Dan Coleman, who apparently was a relief supervisor in the past, however, Coleman walked away when Ross began to talk "trying to think of what to say." (Tr. 128). He also went to the Safety Office to complain about the cartoon, but when he arrived no one was there to accept a complaint. (Tr. 129). He thereafter returned to the I&C Shop, retrieved his job package and performed his job. (Tr. 130).

Subsequently, Myszkiewicz approached him in the Shop and was "kind of upset." Myszkiewicz began "hammering" Ross about his father writing letters to the company and Ross going to the EAP and Human Resources trying to get people fired presumably for involvement with the cartoon. (Tr. 131). According to Ross, during this discussion, Capera entered the area promoting a gun raffle, which was commonplace in the work area. (Tr. 133). Ross commented "something about get an uzi," but, when pressed for specifics, he testified he remarked "I feel like buying an uzi or something like that." (Tr. 134).

On cross-examination, Ross testified that the "uzi" comments made to Myszkiewicz were something to the effect of Ross buying an uzi rather than bringing in an uzi to the plant. (Tr. 320). He acknowledged that after making a comment about the uzi,

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Myszkiewicz stated something to the effect that "we don't need comments like that." (Tr. 322).

Myszkiewicz testified that a rumor was circulating in the shop that Ross had complained to management about the cartoon. He decided to approach Ross and determine if he had complained. In response to his inquiry, Ross remarked "the innocent [always] get the blame" and "all this stuff makes you want to bring in an uzi." (Tr. 902, 904, 906). In a raised voice, he told Ross not to say such things. He thereafter reported the "uzi" comments to fellow employees Dennis Smith and Godfrey Alexander, operations supervisor Charlie Fernandez and to Complainant's supervisor Furhmann. On September 16, 1995, he reported the "uzi" comments to Franzone. (Tr. 991). He observed that Ross was acting erratic and irregular, and Myszkiewicz became concerned for the safety of other I&C specialists. (Tr. 912). All employees are trained to observe and report irregular conduct and aberrant behavior. (Tr. 914-915). According to Myszkiewicz and Capera, no gun lottery was being conducted at the time of Complainant's "uzi" comments. (Tr. 881, 928-929).

Subsequently, according to Hugh Thompson, bargaining unit employees John Terramoccia, Michael Bridgeman and Dan Coleman requested to meet with Franzone because they did not want to work with Ross due to the rumors about him, particularly the "uzi" comments and going to management about the cartoon. (Tr. 801-802). Bridgeman also added that Complainant's request to work with Smith and the parking lot incident with Jacques motivated him to speak to Franzone. (Tr. 837). He had no knowledge of Complainant's alleged protected activities. (Tr. 838-839). According to Hugh Thompson, when he confronted Ross about going to management concerning the cartoon, Ross stated he started the rumor himself to make employees involved with the cartoon "suffer or worry about their jobs." (Tr. 802).

Franzone approached Ross at his work site after learning of his concern about the cartoon and the reference to him as "fucking stupid" and engaged in a lengthy discussion

about Ross' concerns, which did not include nuclear safety issues. (Tr. 626). Franzone thereafter informed the union stewards and field supervisors that, if anyone continued to call Ross names, disciplinary action would be taken. (Tr. 627-628).

G. The September 16, 1995 Meeting

On September 16, 1995, Ross was summoned and reported to the VP conference room where Bob Marshall was present along with Steve Franzone, Hugh Thompson, Johnny Randalls and a security person. Johnny Randalls and Hugh Thompson, union stewards, were not present at Complainant's request. (Tr. 143). Franzone informed Ross that he would get right to the point and stated "we're pulling your badge." (Tr. 144; See RX-15). According to Ross, he was not informed of the reason for this action although he asked and was informed that "they could not say." He was instructed to see Dr. Luis Rodriguez. (Tr. 145). Ross was not informed of the reason for contacting Dr. Rodriguez. (Tr. 146).

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Ross testified that as a result of his badge being pulled, he was excluded from the protected area of the plant where he performed his job. (Tr. 145). According to Ross, the management officials did not speak to him about the "uzi" incident, any threats that he may have made, his psychological well-being or his previous union grievances alleging harassment. (Tr. 147).

Ross reported a break-in of his desk wherein cartoons were placed in each desk drawer. He requested an investigation be conducted into the break-in. He was informed that an investigation could not be conducted. (Tr. 149). At the end of the meeting Ross was escorted outside of the protected area and left the plant with his fellow car pool riders.

On cross-examination, Ross testified that before his discharge he informed supervisors and managers at FPL that he felt he was being treated differently, adversely or retaliated against for raising nuclear safety concerns. He specifically recalled making such a statement at the September 16, 1995 meeting. (Tr. 311). When specifically asked what he said, he testified that "I felt like I did some grievances and had some discussions with Steve [Franzone] and now all this stuff is going on." He further vaguely stated that during these "discussions" they talked about nuclear safety concerns. (Tr. 311).

Ross further testified that he informed those present at the September 16, 1995 meeting, he felt he was being retaliated against for having filed grievances. (Tr. 312-313). When asked specifically if he felt retaliation for raising nuclear safety concerns, Ross stated that he had made such a statement at a September 13, 1995 grievance meeting. He then recanted and stated that he had not announced that he felt retaliation because of raising nuclear safety concerns at the September 16, 1995 meeting. (Tr. 313). At the September 13, 1995 meeting, which concerned the Hagen vendor training, Ross testified that he contended the Hagen vendor training was a nuclear safety concern. (Tr. 313-314). Ross stated that at the September 16 meeting when his security badge was pulled, he was

retaliated against on that occasion because of having filed a grievance over the Hagen vendor training and "other things," including the events in the Cal Lab. (Tr. 315). Ross stated that the "uzi" comments were not advanced as a reason for his security badge being pulled. (Tr. 315).

Garner testified that Complainant's grievances in September 1995 only involved training issues and Ross never raised any nuclear safety concerns or retaliation during the meetings. (Tr. 786, 788).

Hugh Thompson testified that at the September 16, 1995 meeting, Ross was told that his access was being suspended due to his actions, particularly the "uzi" comment incident. (Tr. 803). Thompson further recalled that although Ross did not immediately admit to making the uzi comments, he eventually admitted having made such a comment. Thompson and Randalls, the chief union steward, met with Ross after the meeting and explained the suspension of access to him. Thompson did not believe that there could have been any doubt in

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Complainant's mind regarding what he had to do to regain access through EAP. (Tr. 805).

Franzone testified that he made the decision to suspend Complainant's access and have Ross evaluated by EAP based on input from other employees, Human Resources and security. (Tr. 655-656). Franzone was informed on September 15, 1995, by Furhmann that Ross had requested a job assignment with Joel Smith to learn how to draw and had made a comment about "needing to do what he needed to do." (Tr. 621-622). Rich Stripling, a shop steward, informed Franzone that employees were blaming Ross for going to management and complaining about the cartoon. (Tr. 623-624). On September 16, 1995, three employees, including Bridgeman and Hugh Thompson, met with Franzone and stated they did not want to work with Ross because they felt unsafe. The three employees considered Ross to be unsafe because of the Jacques incident, the request for job assignment to work with Joel Smith and the "uzi" comments. (Tr. 623-624, 629-630). Franzone had not previously been informed of the "uzi" comment, but concluded that he could not ignore Complainant's behavior. (Tr. 630). Franzone thereafter confirmed the "uzi" comments through Myszkiewicz who informed Franzone that he was fearful of Ross. (Tr. 632-633). Franzone stated that at no time during the September 16, 1995, meeting did Ross bring up any nuclear safety concerns or allegations of retaliation. (Tr. 635).

Ross testified that at the September 16, 1995 meeting, his pay was suspended and his unescorted access to the plant was pulled. (Tr. 333). He acknowledged being told that he needed to see Dr. Rodriguez or EAP for a referral for evaluation. (Tr. 334). Ross further acknowledged that in his pre-hearing deposition on February 12, 1997, when asked if he was informed that his access to the plant was being suspended, he responded, "no. That is not true." He immediately recanted testifying that his access was suspended but the word

"suspended" was not used. (Tr. 335). He stated that he understood he did not have access to the plant after the September 16, 1995 meeting. He subsequently acknowledged he affirmed in a pre-hearing, signed affidavit that at the September 16, 1995 meeting he was advised "my unescorted access to the plant was suspended." (Tr. 336). (emphasis added).

H. Dr. Dennis L. Johnson, Ph.D.

On Monday, September 18, 1995, Ross called Dr. Rodriguez who informed Ross to see Dr. Dennis Johnson, a psychologist, on September 20, 1995. (Tr. 150-151). Ross was required to drive 100 miles from his home to Dr. Johnson's office located in Stuart, Florida. (Tr. 152). At this appointment, Ross questioned the need to complete certain paperwork and sign certain forms. Ross sought an opportunity to seek advice and was, according to Ross, denied such an opportunity. He then left Dr. Johnson's office without completing the paperwork. (Tr. 153). He subsequently telephoned Dr. Rodriguez to report the events of that day and was informed that another appointment would be made for him.

Ross attended the second appointment on September 22, 1995. On that day,

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he was administered written tests, which took most of the day, and required his return to Dr. Johnson's office the following Monday. (Tr. 155-156). On Monday, September 25, 1995, he had a brief discussion with Dr. Johnson but was not informed of the results of his tests. (Tr. 157). After meeting with Dr. Johnson, Ross reported to Dr. Rodriguez, confirming that he met with Dr. Johnson. Dr. Rodriguez indicated that he would get back with Complainant. He subsequently informed Ross that based on Dr. Johnsons's recommendation, he was to see Dr. Salo Schapiro. (Tr. 159).

On cross-examination, Ross admitted that he informed Dr. Johnson he had become physical with Jacques in the parking lot in 1994, grabbing Jacques' chest. (Tr. 343). Ross did not recall or know whether he informed Dr. Johnson that he stated to Jacques that he would kill him. (Tr. 343-344). He also admitted to Dr. Johnson that he had made a statement to the effect of "getting an uzi" rather than buying an uzi. (Tr. 345).

Ross admitted that during his conversations with Dr. Johnson, he did not mention anything about being retaliated against because of nuclear safety concerns which he allegedly raised. (Tr. 351). Dr. Salo Schapiro, a board-certified psychiatrist, evaluated Ross on October 11, 1995. (RX-42). Ross indicated that they talked for a couple of minutes, but he did not undergo any testing on that occasion. (Tr. 161). After meeting with Dr. Schapiro, Ross called Dr. Rodriguez and informed him that Dr. Schapiro indicated he should return for another appointment. Dr. Rodriguez did not make another appointment for Ross to see Dr. Schapiro. (Tr. 162).

Dr. Schapiro reported to Dr. Rodriquez that Ross was suffering from a "major mental illness, manifesting clear paranoid compensation as well as a thought process defect." Moreover, he opined that Complainant's overall capacity to work "seems impaired based on his cognitive and behavioral/emotional functioning." (RX-22).

Dr. Johnson testified that he performs fitness for duty evaluations and risk/threat assessments for FPL and has done so for twelve years. (Tr. 950). On October 20, 1995, he prepared a report for FPL in which he opined that Ross was not psychologically suitable for unescorted access authorization. Dr. Johnson recommended professional treatment because of his concerns regarding Complainant's judgment, decision-making abilities and personal stability. (Tr. 961-962; RX-20). During consultation, Dr. Johnson was informed by Ross that he told employee Jacques not "to do it again, I'll kill you" and that he felt "like get an uzi." Dr. Johnson reported that Ross never indicated that he was being retaliated against or mistreated for allegedly filing nuclear safety concerns regarding alleged falsification of calibration data sheets. (Tr. 960).

I. The November 3, 1995 Meeting

Complainant testified that he was contacted by Marshall to report to the Turkey Point Plant on November 3, 1995. He met with Bob Marshall and Greg Heisterman,

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Manager of Maintenance, who represented Franzone. (Tr. 165). Heisterman chaired the meeting and produced a report of discipline and a 45-day letter to Ross. Ross stated that a union steward was present, however, he did not have an opportunity to speak to the steward before the meeting. (Tr. 166).

The report of discipline, which included a five day suspension for inappropriate behavior and threatening co-workers, was read to Ross, but he refused to sign the report. (RX-24). Ross was asked if he desired to say anything and he attempted to do so, however, was informed by Heisterman that he did not really want to hear what had happened. (Tr. 167). The report of discipline reflects "Employee's [Ross] Reaction" to be, in pertinent part:

> "I feel I have been discriminated against. The religious ramifications of the cartoon are obvious and humiliating. I've gone to management and asked not to be called stupid on previous occassions (sic)...I have been more sensitive to this name-calling and humiliation since John Halvorsen, the Cal Lab Supv, told me that I would be denied training because of what Hal Blem(sic) and Sonny Arashiro have said about me. They said I was incapable of being trained..."

(RX-24).

With respect to the 45-day letter, Ross testified he was verbally informed that he was unfit for duty based upon a report received from Dr. Johnson. (Tr. 168-169). He was

informed that his fitness was a "long-term type of thing" and that "they didn't think that I would be able to I guess regain access or whatever within the 45 days." (Tr. 169). He stated someone suggested that he seek private psychological consultation or treatment. (Tr. 170).

In pertinent part, the 45-day letter read:

> I have no choice but to give you 45 days from the date of this letter to find a job within the company that you can perform. You must have the required qualifications and, if necessary, seniority. If you have not found a position within 45 days, you will be discharged from the Company.

(RX-25).

Ross acknowledged that at the November 3, 1995 meeting he was given a report of discipline and a five day suspension for exhibiting inappropriate behavior and making comments of a threatening nature to co-workers. (Tr. 357-358; RX-24). Ross acknowledged that he did not specifically relate to the assembled group that he had raised nuclear safety concerns or felt

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retaliation or adverse treatment by their actions because of having raised such concerns. (Tr. 365). He only mentioned the name-calling and Halvorsen's impression that he should be denied training because he was incapable of learning. (Tr. 361, 365).

Ross confirmed that at the November 3, 1995 meeting he also received the 45-day letter. (Tr. 365; RX-25). He testified that it was explained to him during the course of the meeting that FPL had received Dr. Johnson's report who opined that Ross was not suitable for unescorted access to the plant. (Tr. 366-367). Ross acknowledged it was reasonable to conclude that at the November 3, 1995 meeting he understood if he cleared his access within 45 days he would have retained his I&C position or his newly bid job as an ANPO. (Tr. 370). Ross further acknowledged that Dr. Johnson recommended he pursue psychiatric or psychological treatment as a result of his evaluation. (Tr. 372-374).

Marshall testified that Art Cummings, Fitness for Duty Supervisor, explained to Ross that he needed to seek psychological treatment and after 45 days he could attempt to obtain conditional unescorted access if he was under continuing treatment. (Tr. 535). Cummings informed Ross that his psychological problems were "deeply rooted" and he should not expect to re-obtain access in a short time. Marshall believed that Ross clearly understood the conditional access part of the discussion. (Tr. 536). Marshall further testified that it was clear from the meeting that Ross would be responsible for obtaining another job outside the access area within 45 days or be cleared for access to the plant or be discharged. (Tr. 538). Marshall informed Ross that he could apply for long-term disability but had to do so within the 45 day period because if he was terminated, he could not then apply. (Tr. 538-539).

Marshall stated that at the meeting Ross did not mention retaliation due to nuclear safety concerns. (Tr. 534).

After the meeting, Ross went to see Dr. Rodriguez because he wanted to know if there was anything he could do to get his badge back and to express his willingness to "try anything." He requested support or a referral to a psychiatrist or a clinical psychologist to obtain treatment and was informed that Dr. Johnson and Dr. Schapiro could not assist in such treatment because there would be a conflict of interest with FPL. (Tr. 171). Dr. Rodriguez suggested that he try to get someone on his own. Ross was informed that he needed to find a psychiatrist or psychologist to provide treatment rather than a regular doctor because Dr. Rodriguez would only forward Complainant's records to a specialist. (Tr. 172, 376-377).

Ross further testified that Marshall informed him that a list of bargaining unit and non-bargaining jobs would be made available to him. (Tr. 374-375). Ross also spoke with Marshall concerning long-term disability and was provided application forms for disability. (Tr. 375).

Subsequently, Ross sought out a private psychiatrist, Dr. Lionel Blackman,

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as early as November 15, 1995. (Tr. 172, 430: RX-28). Dr. Blackman requested that Ross obtain information regarding his prior psychological evaluations. On November 15, 1995, by certified mail to Dr. Rodriguez and Marshall, Ross requested all of his records be released to Dr. Blackman. (RX-28). Ross testified that Dr. Rodriguez promised he would produce such records. (Tr. 173). Dr. Blackman did not receive any of his records until late December 1995 and then received only a part of the records requested. (Tr. 175). Ross testified that he received a copy of the letter dated December 11, 1995 from Dr. Rodriguez to Dr. Blackman in which certain materials relating to Complainant were forwarded to Dr. Blackman. (Tr. 389; RX-31). Dr. Blackman did not render a report concerning Complainant's psychiatric condition. (Tr. 176).

Ross testified that on December 20, 1995, he attended a status meeting with Marshall, at which time he prepared a second written request for his records, which was faxed to Dr. Johnson. (CX-14, Exh. 3). Dr. Johnson's office informed Ross that upon receipt of a release from FPL his records would be forwarded. (Tr. 176-177). Ross advised Marshall that he was unable to accomplish psychological counseling with Dr. Blackman because of his inability to obtain the records he requested on November 15, 1995. (Tr. 434). Ross did not return to Dr. Blackman after December 20, 1995. (Tr. 177). Marshall testified that as of December 20, 1995, Ross had not sought a release of his records from Dr. Johnson's office. (Tr. 547). Marshall concluded that Ross had not done anything to comply with the conditions set at the November 3, 1995 meeting regarding psychological or psychiatric treatment and had "not done enough" to find another job, thus, in short, he had not complied with FPL's expectations. (Tr. 550). Marshall testified that the termination was

not implemented 45 days after the notice because it was the holiday season and there is "a lot of stress during that time." (Tr. 549).

On cross-examination, Ross denied that he received a list of job openings on November 17, 1995. (Tr. 378; RX-45). He also denied receiving a list of available jobs on November 29, 1995. (Tr. 379). Ross testified that he did not receive a job listing dated November 20, 1995, but received a job listing dated December 14, 1995. (Tr. 380). He did not recall receiving a listing dated December 8, 1995. (Tr. 381). Ross testified that he requested from Marshall any type of training that would make him more marketable. According to Ross, Marshall stated that training was not possible at that time. (Tr. 381-382). Ross indicated that on November 8, 1995, he forwarded a letter to Marshall regarding a specific listing in a local newspaper for a customer service representative position. (Tr. 383; RX-26).

Ross further stated that the job listings received from FPL were untimely in that the period for applying for such vacancies had expired before he received the listings. (Tr. 431). Ross testified that during ANPO training, a trainee did not need unescorted access since, if a need to enter the plant to do walk downs occurred, the trainee could be escorted to perform those functions. (Tr. 431-432). Thus, he could have attended ANPO training while continuing to regain unescorted access to the plant.

J. The December 29, 1995 Termination

On December 29, 1995, Ross was called into the plant to attend a meeting with Franzone and Marshall. At the meeting, Franzone read a letter dated December 29, 1995, which

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terminated Ross' employment from FPL for failing to achieve employment in a non-access job or regaining unescorted access. (Tr. 177, 392; RX-32).

Ross testified that his understanding from the November 3, 1995, meeting was that, because his psychological problems were long term, there was no possibility that he would ever be able to regain access within the 45 days extended to him by the 45-day letter. (Tr. 179). He further understood that he would have to find jobs that would be outside the protected area in order to retain his employment with FPL. (Tr. 179). He applied for a customer service position with the company. He was specifically informed by Marshall that, if he was going to apply for any job position, he had to go through Marshall. (Tr. 179).

He testified that he asked Marshall at some point in time what he had to do to return to his ANPO job, proceed to the ANPO position for which he had been selected through the bid process or to continue his nuclear tutor position which he had filled before the 45-day

letter. (Tr. 180). Ross testified that the ANPO job and the nuclear tutor job were outside of the protected area.

Ross testified that the nuclear tutor job only consumed ten hours per week and provided income of a couple hundred dollars per week. (Tr. 182). Although he had applied for the customer service position, he acknowledged he was not accepted for that position although he thought he was qualified since it required communications skills and some typing. (Tr. 182). He further stated that the I&C Shop had some jobs that were outside the access area. (Tr. 182).

Ross testified that on December 29, 1995, Franzone and Marshall did not elaborate on the reasons for terminating Complainant. (Tr. 183; CX-6).

Ross testified that he did not feel that he had any psychological problems, any homicidal tendencies to hurt anyone, nor did he harbor any problems such as that. He believed the intense harassment to which he was subjected, along with the discrimination and retaliation, created a stress or a strain on him which may have affected his ability to perform his job. (Tr. 205-206).

Ross testified that it was very important to be very physically and mentally fit to work in a nuclear power plant. He further agreed that an I&C specialist is a critical position since the duties of that job could easily trip the reactor or bring the plant down. (Tr. 207).

On cross-examination, Ross testified that on December 29, 1995, he was not offered an exit interview or a whole body count. (Tr. 396). Ross admitted that he did not specifically request a whole body count at the time of his termination. (Tr. 400). He stated that he believed his denial of a whole body count played a part in the harassment, discrimination and

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retaliation against him for having raised nuclear safety concerns. (Tr. 402). He, however, admitted that it is not a requirement of the NRC that an employee be given a whole body count on the day he departs employment. (Tr. 404). He further admitted that the questionable personnel practices of denying an exit interview and whole body count were raised to the NRC and found to be non-meritorious. (Tr. 404-405; RX-35; RX-36).

Ross testified that the ANPO position for which he was selected was outside the protected area and that some I&C jobs were also outside the protected area, but were digital specialist positions for which he was not qualified. (Tr. 408-409). During outages, I&C digital specialists are brought into the plant to perform their duties. (Tr. 409). Ross testified that the nuclear tutor job which he performed was not a collective bargaining position but he was paid extra wages as a tutor during lunch and after hours. (Tr. 409-410). He further stated that part of the ANPO training required the trainees to enter the plant and "walk down the jobs" and do certain hands-on training inside the protected area.

(Tr. 410). ANPO training was the initiation of a career path that would possibly lead to a RCO position, a NPO (Nuclear Plant Operator) or a SNPO (Senior Nuclear Plant Operator), which are all licensed programs and which, from time to time, require work within the protected area. (Tr. 411-412).

Franzone testified that Ross was discharged because he never regained his access nor did he make any progress in finding another job within FPL. Franzone stated that at the time of Complainant's discharge he was not aware that Ross had gone to the NRC nor was he aware that Ross raised nuclear safety concerns or voiced concerns over falsification of calibration data sheets. (Tr. 636, 670). Franzone testified that he was not retaliating against Ross by discharging him for raising any past concerns. (Tr. 636). Franzone further stated that the whole point of ANPO training was to license and permit employees to enter the plant unescorted and hold a watch station. (Tr. 637). According to Franzone, ANPO jobs are also critical and require mental and physical stability. (Tr. 642). Franzone acknowledged that if an employee was asked to falsify documents or calibration readings, such requests for falsification would be a safety concern. (Tr. 665-666).

Marshall corroborated the testimony of Franzone that Ross did not mention nuclear safety concerns, falsification of data sheets or retaliation against him for such activities during the termination meeting or at any other time. (Tr. 550, 554, 580).

IV. DISCUSSION

Prefatory to a discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record. See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 (Sec'y Oct. 23, 1995)(Slip Op. p. 4).

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Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ...Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence.

In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Generally, of the two primary witnesses in this matter, Complainant was not an impressive witness in terms of confidence, forthrightness and overall bearing on the witness stand. His testimony can generally be characterized by inconsistencies, retractions and contradictions. He appeared confused and equivocal during portions of his testimony, particularly related to his suspension of access and the evaluation by Dr. Johnson. He presented testimony in a muddled, unfocused manner and lacked direction, often straying from the question at hand to other unrelated events. On the other hand, Steve Franzone's testimony was straight-forward, detailed and presented in a sincere, consistent manner. Franzone conveyed a genuine concern for Complainant and his perceptions of the work place.

The issues presented for resolution will be treated seriatim hereinafter.

A. Timeliness of Complainant's Complaint

(1) The Filing Period

An employee who believes that he has been discharged or otherwise discriminated against in violation of the ERA must file a complaint with the Secretary of Labor

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within 180 days of the alleged violation. The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the Respondent's employment decision. The United States Supreme Court has held that the proper focus is on the time of the discriminatory act and not the point at which the consequences of the act become painful. Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498 (1980); Chardon v. Fernandez, 454 U.S. 6, 9, 102 S.Ct. 28, 29 (1981).

In the present case, on September 16, 1995, Respondent suspended Complainant's unescorted access authorization to the Plant, which was necessary for Complainant to

perform his job. Respondent implemented such action based on Complainant's aberrant behavior and conduct manifested in his request to be assigned to work with Joel Smith to learn how to draw cartoons, his reactive response to the September 14, 1995 cartoon, his "uzi" comments and implicit threats to co-workers and the employee concern of having to work with Ross who was considered unsafe. I&C Maintenance Supervisor Franzone instructed Ross to contact Dr. Luis Rodriguez to have him determine the appropriate course of action. Dr. Rodriguez recommended Complainant see Dr. Dennis Johnson, a psychologist, for further evaluation. Dr. Johnson, in turn, concluded that Complainant was not psychologically suitable for unescorted access authorization and recommended he participate in psychiatric and psychological treatment. (Tr. 961-62).

On November 3, 1995, a meeting was held during which Complainant received the "45-day" letter from Respondent which informed him that his unescorted access to the facility had been suspended and that he had 45 days to find an alternative job within the company that did not require unescorted access. (See RX-25). I specifically find that at this meeting, Complainant was told by Franzone he would be terminated if he did not regain his access to the nuclear plant or failed to find another position with FPL within the 45-day limit. I further find that Complainant acknowledged and understood the terms and conditions of the "45-day" letter as explicated by Franzone during the meeting. On December 29, 1995, Complainant received a termination letter which informed him that in addition to finding an alternative position within the company, he could have cleared his access requirement through the Medical Review Officer. (See RX-32).

Respondent correctly argues that the time for filing a complaint begins when the employee receives final and unequivocal notice of the challenged employment decision, rather than the time that the effects of that decision are ultimately felt. English v. Whitfield, 858 F.2d 957, 961 (4th Cir. 1988). In the English case, the court opined that the letter received by the employee, giving her ninety days to find an alternative job in the company or she would be terminated, was final and unequivocal because there was no intimation in the letter that the employment decision was subject to appeal, review or revocation. Id.

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Respondent contends that because the Complainant received a similar letter as in the English case, Respondent's "45-day" letter to Complainant was final and unequivocal notice of the employment decision. Thus, Respondent avers that the time period for filing the instant complaint commenced on November 3, 1995.

Complainant contends, however, that his case is distinguishable from English because the letter he received was not final and unequivocal notice of termination. Complainant further argues that Respondent's "45-day" letter was actually part of a continuing violation to terminate Complainant for reporting safety violations by Respondent to the NRC. He further argues that because the December 29, 1995 termination letter, and not the "45-day" letter, informed Complainant that he could clear his unescorted access

through the Medical Review Officer or find alternative employment within forty-five days, the time period within which to file his complaint should commence on December 29, 1995.

The undersigned initially denied Respondent's motion for summary decision on the timeliness issue because genuine issues of material fact existed, including the apparent inconsistency between the 45-day letter, which omitted any reference to Ross regaining his unescorted access to the plant, and the December 29, 1995, termination letter. (ALJX-9). At the hearing, additional evidence relating to the finality, definiteness and equivocation of the notice to terminate Complainant was presented. It is patently clear that at the November 3, 1995 meeting, Complainant was informed by Franzone that he would be terminated within 45 days if he failed to regain access to the nuclear plant or failed to find another position with FPL outside the protected area. Based on Complainant's testimony, I find that as a result of the November 3, 1995 meeting, he fully understood the foregoing conditions of the termination notice. Thus, I find that the option to regain his unescorted access was not a new condition raised for the first time in the December 29, 1995 letter.

Considering the foregoing, particularly the acknowledgment and understanding by Ross of the conditions of the termination notice discussed at the November 3, 1995 meeting, I conclude that the November 3, 1995 letter, is final, definitive and unequivocal. The letter is decisive and conclusive, leaving no further chance for action, discussion, or change. There is no intimation in the notice that the employment decision was subject to appeal, review or revocation. The notice is unequivocal in that it is not ambiguous, i.e., free of misleading possibilities. Complainant was aware that if he did not regain his access to the nuclear plant or did not find another position with FPL within the 45-day limit, he would be terminated.

The fact that assistance may have been extended to Complainant through job listings or placement does not alter the triggering date of the filing period. See Ballentine v. Tennessee Valley Authority, Case No. 91-ERA-23 (Sec'y Sept. 23, 1992)(Slip op. at 2). Therefore, I find and conclude that November 3, 1995 constitutes the date of the alleged discrimination and the commencement of Complainant's filing period.

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(2) Alleged Continuing Violations

Complainant's assertion that Respondent engaged in continuous violations through the date of his termination, and thus his complaint was timely filed, is without factual foundation. Ross contends that, after reporting safety concerns to the NRC, he was subjected to acts of retaliation which manifested itself in the form of name-calling, assignment to the menial tasks of handing out equipment, repeatedly being refused training without reasons and denied a "transfer" from such a hostile environment. A

theory of retaliatory harassment is cognizable under the ERA. English v. Whitfield, supra., at 963-964.

The timeliness of a complaint may be preserved under the theory of a continuing violation where there is an allegation of a course of related discriminatory conduct and where the complaint is filed within the requisite time period after the last alleged discriminatory act. See Eisner v. Electrical District No. 2 of Pinal County, Case No. 90-SDW-2 (Sec'y Dec. 8, 1992); Howard v. Tennessee Valley Authority, Case No. 91-ERA-36 (Sec'y Jan. 13, 1993); Wagerle v. The Hospital of the University of Pennsylvania, Depts of Physiology and Pediatrics, Case No. 93-ERA-1 (Sec'y Mar. 17, 1995). Timeliness is measured from the last occurrence of discrimination. Garn v. Benchmark Technologies, Case No. 88-ERA-21 (Sec'y Sept. 25, 1990). Moreover, a continuing violation may exist if related discriminatory acts constitute a course of discriminatory conduct by Respondent which has gone unabated. Flor v. United States Department of Energy, Case No. 93-TSC-1 (Sec'y Dec. 9, 1994).

In Flor, the Secretary adopted the analysis of "sufficiently related" by the U. S. Court of Appeals for the Fifth Circuit in a Title VII case, Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983), cert. denied, 479 U.S. 868 (1986). The Berry court listed three determinative factors in its analysis: (1) whether the alleged acts involve the same subject matter; (2) whether the alleged acts are recurring or more in the nature of isolated decisions; and (3) the degree of permanence of such action. Id. at 981. The fact that each of the various acts relied upon by Complainant may have affected his working conditions or environment does not make them "related" for purposes of the continuing violation theory. Gillilan v. Tennessee Valley Authority, Case Nos. 92-ERA-46 and 92-ERA-50 (Sec'y Apr. 20, 1995); See also Holtzclaw v. Commonwealth of Kentucky Natural Resource and Environmental Protection Cabinet, Case No. 95-CAA-7 (ARB Feb. 13, 1997).

The record establishes that three of the four factors upon which Ross relies (menial taskings, denial of training and denial of a transfer) were isolated events and factually can not be construed to be recurring. None of the alleged acts involve the same subject matter and each reached a degree of permanence because they all occurred before November 3, 1995. There is no record evidence that any of the four retaliatory acts/factors occurred within the 180 day filing period after November 3, 1995, or during the 180 days preceding the actual filing on June 21, 1996. In view of the above, I find and conclude that Complainant failed to establish a continuing violation theory which would have delayed the commencement of the statutory filing period.

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(3) Equitable Tolling

Complainant does not argue that if the 180-day filing period is held to commence on November 3, 1995, the limitation period must be tolled for equitable considerations.

Courts have held that time limitation provisions in like statutes are not jurisdictional, in the sense that a failure to file a complaint within the prescribed period is an absolute bar to administrative action, but rather analogous to statutes of limitation and thus may be tolled by equitable consideration. School District of the City of Allentown v. Marshall, 657 F.2d 16 (3d Cir. 1981); Coke v. General Adjustment Bureau, Inc., 64 F.2d 584 (5th Cir. 1981); Donovan v. Hakner, Foreman & Harness, Inc., 736 F.2d 1421 (10th Cir. 1984). The Court in School District of the City of Allentown warns, however, that the restrictions on equitable tolling must be scrupulously observed; the tolling exception is not an open invitation to the court to disregard limitation periods simply because they bar what may be an otherwise meritorious cause. Accord, Rose v. Dole, 945 F.2d 1331, 1336 (6th Cir. 1991).

In School District of the City of Allentown, the court, relying on Smith v. American President Lines, LTD., 571 F.2d 102 (2d Cir. 1978) which interpreted Supreme Court precedent, observed that tolling might be appropriate only where a respondent actively misled the complainant respecting the cause of action; or where the complainant has in some extraordinary way been prevented from asserting his rights; or a complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. Id. at 19-20.

Complainant argues that Respondent deprived him of documentary information that, if timely received, would have allowed him to make a "good faith effort" to regain his unescorted access through outside professional assistance and/or obtain a job not contingent upon access. Contrary to his assertions, I find that Ross failed to request medical documentation from Drs. Johnson and Schapiro regarding testing and evaluation until December 20, 1995. There is no record evidence of any earlier requests made of Drs. Johnson or Schapiro by Complainant.[3]

Moreover, the credible record evidence establishes that Ross was supplied with job listings during November and December, 1995, contrary to his general denials. (See RX-45). Ross applied for only one non-nuclear position, but was deemed unqualified and not extended an interview. The record also amply supports a conclusion, and I so find, that the ANPO position, for which Ross was selected, required training and job duties within the unescorted area of the plant. I do not regard Ross' nuclear tutor job, sponsored by the University of Maryland, to be a viable alternative to the November 3, 1995 notice because it is performed on a part-time basis and is not a regular position at FPL. Accordingly, I find Ross did not establish that Respondent deprived him of timely, necessary information which would have allowed him to fulfill either option available to him to avoid termination.

In the present matter, Complainant neither alleges, nor does the record support a conclusion, that Respondent attempted to conceal information or mislead him, that he was prevented from asserting his rights or that he mistakenly raised the precise statutory

claim in the wrong forum. Thus, having considered the foregoing factors, the undersigned finds that Complainant failed to establish a basis upon which to raise the issue of equitable tolling. Accordingly, equitable tolling of the statute is not justified in this particular case.

Therefore, a timely complaint under the ERA should have been filed by May 3, 1996. Since the complaint was not filed with DOL until June 21, 1996, it was clearly untimely. See Kang v. Department of Veterans Affairs Medical Center, Case No. 92-ERA-31 (Sec'y Feb. 14, 1994); Cox v. Radiology Consulting Associates, Inc., Case No. 86-ERA-17 (Sec'y Nov. 6, 1986; ALJ Aug. 22, 1986); Prybys v. Seminole Tribe of Florida, Case No. 95-CAA-15 (ARB Nov. 27, 1996). I further find that there is no genuine issue of material fact concerning Complainant's failure to timely file his complaint within the 180-day statutory period. Accordingly, his complaint under the ERA is time-barred and it is recommended that such complaint be dismissed.

B. Respondent's Alleged Discriminatory Actions

Notwithstanding the foregoing recommendation of dismissal, alternatively, assuming arguendo that Complainant timely filed his complaint with DOL, I find and conclude that Respondent took adverse action against Complainant for legitimate, nondiscriminatory reasons.

The Secretary of Labor has repeatedly articulated the legal framework within which parties litigate in retaliation cases. Under the burdens of persuasion and production in whistleblower proceedings, the complainant first must present a prima facie case. In order to establish a prima facie case, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against the employee. Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995). The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id. See also McCuistion v. TVA, Case No. 89-ERA-6 (Sec'y Nov. 13, 1991)(Slip op. at 5-6); MacKowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (6th Cir. 1983).

The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant may counter respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Yule v. Burns International Security Service, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). In any event, the complainant bears the burden of proving by a preponderance of the evidence that he was retaliated

against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Dean Darty v. Zack Company of Chicago, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9) (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981)).

Since this case was fully tried on the merits, it is not necessary for the undersigned to determine whether Ross presented a prima facie case. See Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 (Sec'y Feb. 15, 1995)(Slip op. at 11, n.9), aff'd sub nom Bechtel Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996). Once FPL produced evidence that Ross was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether Ross presented a prima facie case. Instead, the relevant inquiry is whether Ross prevailed by a preponderance of the evidence on the ultimate question of liability. See Reynolds v. Northeast Nuclear Energy Co., Case No. 94-ERA-47 (ARB Mar. 31, 1997)(Slip op. at 2); Boschuk v. J&L Testing, Inc., Case No. 96-ERA-16 (ARB Sept. 23, 1997)(Slip op. at 3, n. 1); Eiff v. Entergy Operations, Inc., Case No. 96-ERA-42 (ARB Oct. 3, 1997). If Ross did not prevail by a preponderance of the evidence, it matters not at all whether he presented a prima facie case.

The undersigned finds that as a matter of fact and law, FPL has articulated a legitimate, nondiscriminatory reason for its actions. Zinn v. University of Missouri, Case No. 93-ERA-34 (Sec'y, Jan. 18, 1996)(Slip op. at 4). Achieving unescorted access to the protected area of a nuclear facility is a process that is highly regulated by the NRC. See 10 C.F.R. §§ 26.10 and 73.56. It is incontrovertible that safety and security of nuclear facilities is paramount in light of the potential for death and destruction if not properly supervised and monitored.

The record clearly demonstrates, as detailed hereinabove, the unusual, erratic and bizarre behavior exhibited by Complainant throughout his employment with FPL. Not only did he assault a co-worker in FPL's parking lot, but he also made comments to co-workers and supervisors about killing people and bringing an Uzi to work. These comments were reasonably interpreted as threatening the safety and well-being of persons employed at FPL. It is undisputed that Complainant was employed in a security-sensitive position. Testimonial evidence shows that I&C specialists play a crucial role in the operation of the plant; a mistake could potentially shut down the reactor. As Respondent avers in brief "in light of the nature of FPL's business, nuclear energy production, Ross' aberrant behavior left unchecked could well have posed a threat to the public at large." (FPL's Proposed Recommended Decision and Order at 54).

Accordingly, I find and conclude that FPL properly suspended Ross' unescorted access privileges. In Mandreger v. The Detroit Edison Co., Case No. 88-ERA-17 (Sec'y Mar. 30, 1994), the Secretary recognized that "the inherent danger in a nuclear power plant justifies [Respondent's] concern with the emotional stability of the employees who work

there" and noted that the NRC requires licensed operators of nuclear facilities to ascertain the emotional stability of its employees. (Slip op. at 17). Moreover, in Mandreger, there was ample reason not to permit Complainant to return to work at Respondent's nuclear plant after psychotic episodes. See also Jones v. N.Y.C. Housing Authority, 1996 WL 556995 (S.D.N.Y. 1996) (employee who threatened to get an Uzi was properly suspended from work in order to undergo psychiatric examination); Floyd v. Arizona Public Svc. Co., Case No. 90-ERA-39 (Sec'y Sept. 23, 1994)(complainant's revelation of a pact to kill executives if any harm befell complainant or another co-worker provided ample reason for temporarily suspending complainant's authorization to enter a secured area, evaluating complainant's fitness for duty, issuing complainant a written reprimand, and suspending complainant without pay); Couty v. Arkansas Power & Light, Case No. 87-ERA-10 (Sec'y Feb. 13, 1992)(finding respondent articulated legitimate business reasons in support of its action in discharging Complainant including complainant's abusive, disruptive, profane, and threatening behavior toward supervisors on at least three occasions).

The evidence also shows that Ross underwent evaluations for his fitness for duty by a stipulated expert in the field of threat assessment in the workplace. Dr. Johnson examined Complainant and concluded that Complainant was not psychologically suitable for unescorted access authorization at a nuclear power plant.

Dr. Johnson also referred Complainant to a psychiatrist for a second opinion. Dr. Schapiro opined that Complainant suffered from a major mental illness and manifested clear paranoid decompensation as well as a thought process defect. It is reasonable to conclude that such findings are inconsistent with someone psychologically suitable for unescorted access to a nuclear power plant. In Crosier v. Portland General Electric Co., Case No. 91-ERA-2 (Sec'y Jan. 5, 1994), it was determined that based on the opinion of a clinical psychologist, who recommended denial of continued access because of complainant's aberrant behavior, complainant failed to establish a pretext for respondent's actions.

It is also axiomatic that when Complainant was found to be unsuitable for unescorted access, he could no longer enter the protected area to perform his job. However, Respondent did not discharged Complainant. Instead, FPL gave Complainant 45 days to find alternative employment with the company or regain his access authorization. The record indicates that Complainant satisfied neither of these conditions. Accordingly, I find that Complainant was appropriately discharged and that FPL has established a legitimate, nondiscriminatory reason for its action.

The burden shifts to Complainant to demonstrate that FPL's proffered motivation was pretextual and that its actions were actually based on discriminatory motive. Leveille v. New York Air National Guard, Case No. 94-TSC-3 and 94-TSC-4 (Sec'y Dec. 11, 1995)(Slip op. at 7-8); Carroll v. Bechtel Power Corp., supra. at 6; See Bechtel Construction Company, supra. at 934. Complainant may

demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. 42 U.S.C. § 5851(b)(3)(c); Zinn, supra at 5; Yellow Freight Systems, Inc., 27 F.3d 1133, 1139 (6th Cir. 1994). Complainant retains the ultimate burden of proving, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity in which he was allegedly engaged in violation of the ERA. Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)). See also Creekmore v. ABB Power Systems Energy Service, supra. Thus, I find that Complainant has not shown that the reasons articulated for his termination were pretextual.

Complainant asserts that FPL did not cooperate with him in his alleged attempt to secure other employment within the company or his alleged attempt to seek treatment to regain his access to the power plant within the forty-five day limit. In this regard, Complainant testified that he did not receive any IPS job listings, that he had applied for a position in FPL's Information Management Business Unit, and that he had already been offered an ANPO position prior to his suspension. The undersigned concludes that FPL adequately rebutted this evidence with the credible evidence that Complainant was provided with IPS job listings, but never applied for any of those jobs. Additionally, FPL points out that Complainant was not qualified for the only position in which he ever expressed any interest. Lastly, the ANPO position offered to Complainant before his suspension of access required unescorted access to the nuclear facility, a privilege which Complainant no longer had.

Furthermore, Complainant produced no persuasive evidence that his alleged efforts to seek treatment from his own psychiatrist during the 45-day period were in any way hindered by FPL. To the contrary, the record establishes that FPL's agents repeatedly advised Complainant on what needed to be done in order for him to regain his unescorted access, and periodically checked on Complainant's status to determine if he had sought treatment or otherwise made any effort to regain his unescorted access. I find that Complainant's claim that he was hindered by FPL on this issue simply not persuasive.

Moreover, the passage of one and one-half years from the time of Complainant's initial alleged protected activity convinces the undersigned that the timing of the alleged retaliation is too remote from Complainant's protected activity to establish any causal connection between such activity and the adverse action.[4] See Bonanno v. Stone & Webster Engineering Corp., Case Nos. 95-ERA-54 and 96-ERA-7 (ARB Dec. 12, 1996).

Assuming arguendo, that Complainant did meet his burden of proof showing a causal connection between his protected activity and the name-calling or cartoon, which the record totally refutes, I find that the evidence demonstrates that FPL took immediate action to remedy the situation as soon as Complainant first expressed his unhappiness with the name-calling

and cartoon. In fact, Franzone testified that during one of his meetings with Complainant, Ross expressed displeasure at being called "stupid" and the allegedly offensive cartoon. Immediately following this meeting, Franzone met with and instructed other employees at FPL that anyone engaging in such conduct or behavior would be subject to discipline. Other witnesses who were present at these meetings corroborated Franzone's testimony. Thus, I find that the evidence clearly shows that FPL had no intent to harass Complainant based upon alleged nuclear safety concerns or complaints.

Therefore, the undersigned finds and concludes that Complainant has failed to demonstrate that discriminatory motives played any part in FPL's decision to terminate his employment. The record evidence establishes that the sole reasons for FPL terminating Complainant were (1) his failure to regain access to the nuclear power plant based on his erratic behavior and (2) his failure to obtain other employment within the company during the 45 day time period. Other than Complainant's own testimony, most of which I found incredible and unpersuasive, there was no evidence that he ever raised any nuclear safety concerns while employed by FPL. If he did so complain, Complainant has not established by a preponderance of the evidence that FPL was aware of Complainant's alleged protected activity or activities which form the basis of his claim for retaliatory discharge.[5]

Thus, the undersigned finds that Complainant has failed to establish by a preponderance of the evidence that FPL exhibited any discriminatory motive in reaching its decision to terminate Complainant. Accordingly, no further analysis is warranted because Complainant was subject to adverse action for a legitimate, nondiscriminatory reason.

V. RECOMMENDED ORDER

Based on the foregoing analysis, Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude that Complainant did not timely file his complaint with DOL pursuant to the 180 day statutory time period under the ERA. I also find and conclude that there is no genuine issue of material fact concerning Complainant's failure to timely file. I further find and conclude that Respondent articulated a legitimate, nondiscriminatory reason for its adverse action against Complainant as specifically set forth above. Complainant failed to carry his burden to demonstrate that such reasons were pretextual or that a preponderance of the evidence establishes Respondent's adverse action was motivated for discriminatory reasons. Therefore, it is recommended that Complainant's complaint be **DISMISSED.**

ORDERED this 3rd day of December, 1997, at Metairie, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, D. C. 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978 and 19982 (1996).

[ENDNOTES]

[1] References to the record are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

[2] Moreover, the investigative report is a relevant public document of a federal agency concerning the same complaint presented by the instant case. See Mosbaugh v. Georgia Power Co., Case Nos. 91-ERA-1 and 91-ERA-11 (Sec'y Nov. 20, 1995); Creekmore v. ABB Power Systems Energy Services, Inc., Case No. 93-ERA-24 (Dep. Sec'y Feb. 14, 1996)(Slip opinion at 4).

[3] Although Ross requested Marshall to "have Dr. Luis Rodriguez, Dr. Dennis Johnson and Dr. Salo Schapiro release and send any and all files, records, reports, notes, tests, test results and any other information to Dr. Blackman," thus attempting to place the burden of production on FPL to seek medical release, as a practical matter, such information was not producible at FPL's request in view of the medical privilege existing between medical professionals and patient. (RX-28).

[4] This conclusion is buttressed by the record evidence which is devoid of any animus on the part of Respondent. Incongruously, Respondent even selected Complainant for an nuclear operator position with a defined and progressive career path.

[5] Complainant's claim that Respondent knew or should have known of his activity is premised on the small number of Cal Lab employees. Thus, Complainant urges an analogy to the "small plant doctrine" recognized in labor relations matters that knowledge can be inferred from shop-talk or the closeness of a small group. However, the "small plant doctrine" requires a minimal showing that it is commonplace for the small group of employees to gain knowledge of similar events or rumors. There is no such evidence present in this record.